Supreme Court, U.S.
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86-829

No. ___

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

DIAMOND SHAMROCK CORPORATION,
*Petitioner,*

v.

ZINKE & TRUMBO, LTD., ROBERT M. ZINKE, DAVID B. TRUMBO, MORRIS A. RICHARDSON, JOHN HAMILTON, and MARTHA FRANCIS,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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November 21, 1986

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## QUESTIONS PRESENTED

1. Whether a decision of a first panel of the court of appeals is binding under the law of the case doctrine upon a second panel in a separate appeal, where the issues decided by the first panel were properly raised and fully briefed by the parties only in the appeal before the second panel?

The panel of the Tenth Circuit in this case adopted, as law of the case, the judgment of another panel of the Tenth Circuit in a separate case, which judgment is the subject of Petitioner's Petition for Writ of Certiorari filed on October 14, 1986 in the case of *Diamond Shamrock Corporation v. John Hamilton, et al.,* docketed under case No. 86-607. Therefore, Petitioner realleges the following questions presented in its Petition for Writ of Certiorari pending before this Court in Case No. 86-607:

2(a) Does Fed. R. Civ. P. 49(b), and cases decided thereunder which hold that a party waives the inconsistency of a jury's verdict by not raising it prior to discharge of the jury, apply to a verdict which is not accompanied by special interrogatories?

(b) If so, do they permit a federal court of appeals to reverse a trial court's determination that a new trial is proper?

3. May a federal court of appeals order that a verdict, which is supported by no evidence on essential elements, be reinstated without addressing the errors raised by a party which show that the party

is entitled to judgment notwithstanding the verdict?

4. Whether the court of appeals erred in deciding issues in one appeal which were not raised in that appeal, but which were properly raised and fully briefed only in a separate appeal?

## LIST OF PARTIES AND RULE 28.1 LIST

All parties to this case are named in the caption.

Diamond Shamrock Corporation has no parent company. All of Diamond Shamrock Corporation's subsidiaries are wholly owned. The following are subsidiaries which are not wholly owned by Diamond Shamrock Corporation's wholly-owned subsidiaries: Diamond Shamrock (Africa) Pty. Ltd., Hamada Agricultural Company Limited, Industrials Chemicals (Nigeria), Dichem Limited, Sirotherm, Inc., Metal Coatings International Inc., Metal Coatings International Comercial Ltda., Dacral S.A., Nippon Dacro Shamrock Co., Ltd., Nippon C & Z Company, Ltd., Muenzing Chemie GmbH, A. L. A. Chemicals Limited, Lankro Chemicals Limited, Tongue River Holdings, Inc. Diamond Shamrock has no other affiliates or subsidiaries (except wholly owned subsidiaries).

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OCTOBER TERM, 1986

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DIAMOND SHAMROCK CORPORATION,
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ZINKE & TRUMBO, LTD., ROBERT M. ZINKE, DAVID B. TRUMBO, MORRIS A. RICHARDSON, JOHN HAMILTON, and MARTHA FRANCIS,
*Respondents.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Diamond Shamrock Corporation ("Diamond Shamrock") petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Tenth Circuit.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit has not been reported. It is reprinted in the Appendix hereto, App. A. The orders and opinions of the United States District Court for the Western District of Oklahoma (Eubanks, D.J.) are not reported. They are reprinted in the Appendix hereto, App. B, C, D and E.

## JURISDICTION

The judgment of the court of appeals was entered October 21, 1986, making the petition for certiorari due on January 19, 1987. This Court has jurisdiction to issue the requested writ under 28 U.S.C. §1254(1)(1983).

## STATUTE INVOLVED

Fed. R. Civ. P. 49 provides:

> "RULE 49. SPECIAL VERDICTS AND INTERROGATORIES.
>
> (a)*Special Verdicts.* The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails

to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) *General Verdict Accompanied by Answer to Interrogatories.* The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial."

## REQUEST FOR CONSOLIDATION

Pursuant to Rule 37.3 of the Rules of this Court, Diamond Shamrock respectfully requests that this Court consolidate this Petition for Certiorari with Diamond Shamrock's Petition for Writ of Certiorari filed on October 14, 1986, in the case styled *Diamond Shamrock Corporation v. John Hamilton, et al.*, docketed under Case No. 86-607. This request is based upon the fact that the court of appeals in this case based its judgment, under the law of the case doctrine, on the judgment of another panel of the court of appeals from which Diamond Shamrock filed its Petition for Writ of Certiorari docketed under Case No. 86-607. The propriety of the judgment sought to be reviewed herein is dependent upon this Court's determination of Diamond Shamrock's Petition for Writ of Certiorari in Case No. 86-607.

## STATEMENT OF THE CASE

Petitioner adopts and incorporates by reference the Statement of the Case set forth in its Petition for Writ of Certiorari filed on October 14, 1986 in the case styled *Diamond Shamrock Corporation v. John Hamilton, et al.*, Case No. 86-607.

In 1981, Petitioner instituted this damage action against Respondents, Zinke & Trumbo, Ltd., Robert M. Zinke and David B. Trumbo ("Zinke & Trumbo"). The jurisdiction of the district court was invoked under 28 U.S.C. Section 1332 because of diversity of citizenship.

### Parties

Petitioner Diamond Shamrock was the plaintiff in the district court. Diamond Shamrock is the operator

of the John Hamilton 1-33 gas well located in Ellis County, Oklahoma, under a joint operating agreement. Respondents Zinke & Trumbo were the defendants in the district court. Zinke & Trumbo are parties to the joint operating agreement as non-operators.

Respondents John Hamilton, Martha Francis and Morris Richardson were counterclaimants in the district court. Hamilton and Francis are lessors under oil and gas leases owned by Diamond Shamrock. Richardson is a lessor under an oil and gas lease owned by Zinke & Trumbo. Diamond Shamrock has no contractual relationship with Richardson. All Respondents were represented by the same counsel.

**Claims Raised in District Court**

Diamond Shamrock sought recovery of Zinke & Trumbo's share of the unpaid well costs for the John Hamilton 1-33 gas well. Zinke & Trumbo answered, denying liability for well costs because of the alleged gross negligence on the part of Diamond Shamrock in completing the well. Zinke & Trumbo also asserted a counterclaim for damages which occurred as a result of the alleged gross negligence.[1]

Hamilton, Francis and Richardson joined in Zinke & Trumbo's counterclaim, seeking damages for Diamond Shamrock's alleged negligence in the completion of the well. In addition, Hamilton and Francis counterclaimed for damages for the alleged breach of the implied covenants of their oil and gas leases owned

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[1] Zinke & Trumbo also asserted other counterclaims which are not material to the consideration of the questions presented herein.

by Diamond Shamrock to protect against drainage and to market production.

**District Court Proceedings**

A jury trial was held in 1983. The claims were submitted to the jury on a verdict form which enabled the jury to find for either party on each of the above claims and to fill in a dollar amount as to each claim. The verdict form is reprinted as Appendix H, pages 58a - 59a, to the Petition for Writ of Certiorari filed by Diamond Shamrock in Case No. 86-607 on October 14, 1986.

The jury returned a verdict finding (1) in favor of Diamond Shamrock and against Zinke & Trumbo for the full amount of Zinke & Trumbo's share of unpaid well costs in the amount of $212,805.60, (2) in favor of Zinke & Trumbo on their counterclaim of gross negligence in the amount of $995,196.00, (3) in favor of Hamilton, Francis and Richardson on their counterclaim of negligence in the amount of $971,179.00, (4) in favor of Diamond Shamrock on Hamilton and Francis' counterclaim for breach of the implied covenant to market, and (5) in favor of Hamilton and Francis on their counterclaim for breach of implied covenant to protect against drainage in the amount of $32,499.00 actual damages and $1,000,000.00 punitive damages.

Diamond Shamrock filed an Alternative Motion for Judgment Notwithstanding the Verdict or for New Trial, based on several grounds. That Motion is reprinted as Appendix I, pages 60a - 66a, to the Petition for Writ of Certiorari filed by Diamond Shamrock in Case No. 86-607 on October 14, 1986. Only one of the grounds for new trial pertained to inconsistency

of the jury's verdict. The allegation of inconsistency pertained only to the jury's findings in favor of Diamond Shamrock on its claim, in favor of Zinke & Trumbo on their claim of gross negligence, and in favor of Hamilton, Francis and Richardson on their claim of negligence.

On January 11, 1984, the trial court issued its order granting a new trial on all of the claims which were submitted to the jury, finding that Diamond Shamrock's "Motion for New Trial should be granted in all respects." App. D.

A second jury trial began on February 11, 1985, before the same trial judge. On February 19, 1985, the jury returned a verdict finding only in favor of Diamond Shamrock on its claim against Zinke & Trumbo for the full amount of Zinke & Trumbo's share of unpaid well costs in the amount of $220,830.34. Exh. "A" of App. C. The jury in the second trial, following the trial court's instructions, filled in the blanks on the verdict form pertaining to Diamond Shamrock's claims and did not fill in blanks pertaining to any of the counterclaims.

**Trial Court's Judgment and Order**

After the second trial, the trial court entered a final judgment on the jury's verdict in favor of Diamond Shamrock on the following claims: (1) on Diamond Shamrock's claim for unpaid well costs against Zinke & Trumbo in the amount of $220,830.34, (2) on Zinke & Trumbo's counterclaim for gross negligence, and (3) on Hamilton, Francis and Richardson's counterclaim for negligence. The trial court certified its judgment as final pursuant to Fed. R. Civ. P. 54(b). App. B. That final judgment in favor of Diamond Shamrock

on its claim and on the counterclaims for gross negligence and negligence is the subject of the appeal below. In its Rule 54(b) certification, the trial court stated the claims certified as final were "separate, distinct and independent from" Hamilton and Francis' counterclaims for breach of the implied covenants. App. C.

After the second trial, the trial court also entered an order granting a new trial on its own motion on Hamilton and Francis' counterclaims for breach of the implied covenants to market and to protect against drainage. The trial court certified its new trial order for immediate appeal pursuant to 28 U.S.C. Section 1292(b). App. C. That certified interlocutory order was the subject of a separate, unconsolidated appeal (interlocutory appeal) before the Tenth Circuit.[2] The judgment of the court in the appeal from the certified interlocutory order is the subject of Diamond Shamrock's Petition for Writ of Certiorari filed on October 14, 1986 in Case No. 86-607.

Because the Tenth Circuit in the appeal below (instant appeal) from the final judgment relied on the prior judgment of the panel in the interlocutory appeal, it is necessary to briefly describe how the issues arose in the interlocutory appeal from the Tenth Circuit's decision therein.

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[2] The interlocutory appeal was not consolidated with the instant appeal. At the time oral arguments were heard in the interlocutory appeal, briefing on the merits of the instant appeal had not yet begun. The court of appeals issued its opinion in the interlocutory appeal the day before the last brief on the merits of the instant appeal was filed.

**Decision in Interlocutory Appeal (Subject of Petition for Writ of Certiorari in Case No. 86-607)**

Diamond Shamrock's Petition for Permission to Appeal the certified interlocutory order granting a new trial to Hamilton and Francis after the second trial on their counterclaims for breach of the implied covenants to protect against drainage and to market production was granted. Hamilton and Francis' Cross-Petition for Permission to Appeal the certified interlocutory order was also granted. Zinke & Trumbo did not purport to be a party to the interlocutory appeal.

In their Petition for Permission to Appeal and Docketing Statement, Hamilton and Francis asserted as their sole issue, the trial court's alleged error in granting a new trial after the first trial on their counterclaims for breach of the implied covenants. App. M and N, pp. 118a, 126a, to Petition for Writ of Certiorari filed on October 14, 1986 in Case No. 86-607. Hamilton and Francis stated in their Petition for Permission to Appeal[3] and Docketing Statement[4] that

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[3] Hamilton and Francis stated in their Petition for Permission to Appeal that: "Included in said Certified Interlocutory Order is the Order sought to be appealed hereby, to wit, the Order of the District Court entered January 11, 1984, granting a new trial with respect to counterclaimants' claim for drainage." App. M, p. 121a, to Petition for Writ of Certiorari filed October 14, 1986 in Case No. 86-607.

[4] Hamilton and Francis stated in their Docketing statement that: "It is the Order of the District Court granting a new trial . . . with regard to Intervenors' claims for drainage and failure to market which is being appealed herein" and that: "Thus, the Order appealed herein, i.e. the January 18, 1984 Order of the District Court granting a new trial, remains an Interlocutory Order insofar as Intervenors' claims for drainage and failure to market." App. N, pp. 125a, 126a, to Petition for Writ of Certiorari filed October 14, 1986 in Case No. 86-607.

the order they sought to appeal was the order granting a new trial after the first trial only with respect to Hamilton and Francis' claims for breach of the implied covenants to market and to protect against drainage.

On May 21, 1986, a panel of the court of appeals issued its opinion in the interlocutory appeal, reversing the trial court's order granting a new trial after the first trial and remanding the case with instructions that the district court reinstate the verdict that the jury returned in the first trial and enter judgment thereon. That decision is reprinted as App. A to the Petition for Writ of Certiorari filed by Diamond Shamrock on October 14, 1986 in Case No. 86-607.

The principal opinion (Barrett, C.J.) in that case held that the verdict in the first trial came within the provisions of Fed. R. Civ. P. 49(b) and that Diamond Shamrock waived any error in that verdict by failing to object on the grounds of inconsistency prior to the time the jury was discharged. The principal opinion also held that the trial court erred in finding that the jury's verdict was inconsistent. The court's discussion of the merits pertained nearly exclusively to Diamond Shamrock's claim and to Zinke & Trumbo's counterclaim for gross negligence and Richardson, Hamilton and Francis' counterclaim for negligence, which claims were properly reviewable only in the instant appeal. The court of appeals did not address any other grounds raised by Diamond Shamrock in its Motion for New Trial, nor did it address any of the grounds raised by Diamond Shamrock in support of its Motion for Judgment Notwithstanding the Verdict. The two other panel members

(McKay, C.J. and Tacha, C.J.) concurred only in the portion of the court's opinion that found that the verdict was not inconsistent.

On October 14, 1986, Diamond Shamrock filed, in Case No. 86-607, a Petition for Writ of Certiorari from the Tenth Circuit's opinion in the interlocutory appeal.

**Proceedings and Decision in Instant Appeal**

Respondents filed the instant appeal from the final judgment. All parties briefed the issue of whether the trial court erred in granting a new trial (after the first trial) with respect to Diamond Shamrock's claim for well costs, Zinke & Trumbo's counterclaim for gross negligence, and Hamilton, Francis and Richardson's counterclaim for negligence. The propriety of the trial court's order granting a new trial after the first trial on Zinke & Trumbo's counterclaim for gross negligence was briefed only in the instant appeal.

On October 21, 1986, a panel of the court of appeals issued its opinion in the instant appeal. The court followed the decision of the panel which decided the appeal from the interlocutory order under the law of the case doctrine. The Tenth Circuit held that the order granting a new trial after the first trial (as to all claims) was properly before the Tenth Circuit in the interlocutory appeal and that the panel in the interlocutory appeal properly held that a new trial should not have been granted. The court stated that the prior opinion was binding on the court as the law of the case.

The Tenth Circuit also held that the trial court correctly denied Diamond Shamrock's Motion for

Judgment Notwithstanding the Verdict after the first trial with respect to Zinke & Trumbo's counterclaim for gross negligence and Hamilton, Francis and Richardson's counterclaim for negligence. The court reversed the judgment of the district court entered after the second jury trial and remanded the case with instructions that the district court reinstate the general verdict of the jury of the first trial and enter judgment thereon.

## REASONS FOR GRANTING THE WRIT

### I.a. THE TENTH CIRCUIT ERRED IN FOLLOWING THE DECISION OF THE PANEL IN THE INTERLOCUTORY APPEAL, WHICH HELD THAT A VERDICT NOT ACCOMPANIED WITH SPECIAL INTERROGATORIES FELL WITHIN FED. R. CIV. P. 49(b) AND THAT A PARTY WAIVES INCONSISTENCY IN SUCH A VERDICT, BECAUSE THE PRIOR DECISION IS IN DIRECT CONFLICT WITH DECISIONS OF OTHER CIRCUITS AND RAISES RECURRING AND IMPORTANT QUESTIONS OF FEDERAL PROCEDURE CONCERNING FED. R. CIV. P. 49.

Diamond Shamrock incorporates herein the argument and authorities set forth at pages 14-19 of its Petition for Certiorari in Case No. 86-607 herein. The Tenth Circuit's panel in the interlocutory appeal held that the provisions of Fed. R. Civ. P. 49(b) applied to the verdict in this case even though it was not accompanied by any special interrogatories and that Diamond Shamrock waived any error with respect to such verdict by not requesting resubmission of the verdict to the jury prior to the discharge of the jury. As discussed in Diamond Shamrock's Petition for Writ

of Certiorari filed on October 14, 1986 in Case No. 86-607, the Tenth Circuit's decision in the interlocutory appeal is in direct conflict with decisions of the Fifth and Seventh Circuits and is in conflict in principle with decisions of other circuits. Because the Tenth Circuit in the instant appeal held that the panel's decision in the interlocutory appeal was binding under the law of the case doctrine, a writ of certiorari should be granted for the same reasons set forth in Diamond Shamrock's Petition for Writ of Certiorari filed in Case No. 86-607.

**I.b. THE TENTH CIRCUIT ERRED IN FOLLOWING THE DECISION OF THE PANEL IN THE INTERLOCUTORY APPEAL, WHICH REVERSED THE TRIAL COURT'S ORDER GRANTING A NEW TRIAL, BECAUSE THAT DECISION IS IN DIRECT CONFLICT WITH A DECISION OF THE SEVENTH CIRCUIT AND IS IN CONFLICT WITH ESTABLISHED CASE LAW HOLDING THAT THE TRIAL COURT HAS BROAD DISCRETION IN GRANTING A NEW TRIAL.**

Diamond Shamrock incorporates herein the arguments and authorities set forth at pages 19-23 of its Petition for Writ of Certiorari filed in Case No. 86-607. As discussed in Diamond Shamrock's Petition for Certiorari filed in Case No. 86-607, even if the panel in the interlocutory appeal was correct in applying Fed. R. Civ. P. 49(b) to a situation where it does not apply, the trial court nevertheless had the discretion to grant a new trial because of inconsistency of the verdict, especially where the opposing party did not raise the issue of waiver before the trial court. The Tenth Circuit's decision in the interlocutory appeal is therefore in direct conflict with the decision of the

Seventh Circuit in *Cundiff v. Washburn*.[5] That decision also infringed upon the trial court's discretion by assuming that the sole basis upon which the trial court granted a new trial was the inconsistency of the jury's verdict and by holding that the jury's verdict was not inconsistent. Because the Tenth Circuit in the instant appeal held that the decision in the interlocutory appeal was binding under the law of the case doctrine, certiorari should be granted for the same reasons set forth in Diamond Shamrock's Petition for Writ of Certiorari filed in Case No. 86-607.

**II. THE TENTH CIRCUIT, BY REACHING ITS DECISION BASED SOLELY ON THE LAW OF THE CASE DOCTRINE, ABDICATED ITS RESPONSIBILITY TO DECIDE THE ISSUES PROPERLY RAISED AND FULLY BRIEFED BY THE PARTIES ONLY IN THE APPEAL BEFORE IT AND HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.**

Diamond Shamrock incorporates herein the arguments and authorities set forth at pages 23-27 of its Petition for Writ of Certiorari filed in Case No. 86-607. As set forth in Diamond Shamrock's Petition for Writ of Certiorari filed in Case No. 86-607, the Tenth Circuit in the interlocutory appeal decided issues properly raised and fully briefed only in the instant appeal. Further, in the interlocutory appeal, the Tenth Circuit failed to consider issues briefed by the parties with respect to Diamond Shamrock's entitlement to judgment notwithstanding the verdict with respect to

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[5] 393 F.2d 505 (7th Cir. 1968).

Hamilton and Francis' claims for breach of the implied covenants. The Tenth Circuit thereby reinstated a jury's verdict which was supported by no evidence on certain essential elements.

The Tenth Circuit reversed the judgment on the jury's verdict in the second trial in the instant appeal by merely following the decision of the panel in the interlocutory appeal under the law of the case doctrine. The Tenth Circuit perpetuated the error of the panel which decided the interlocutory appeal. Further, the Tenth Circuit's reliance on the law of the case doctrine was misplaced because the issues decided by the prior panel were not properly before that panel and were not fully briefed.

The Tenth Circuit in the interlocutory appeal decided issues properly raised and fully briefed only in the instant appeal. Those issues involved the propriety of the trial court's order granting a new trial on Diamond Shamrock's claim, on Zinke & Trumbo's counterclaim for gross negligence and on Hamilton, Francis, and Richardson's counterclaim for negligence. The interlocutory order granting a new trial after the first trial on those three claims was reviewable only as part of the instant appeal.[6] Thus, the first panel of the Tenth Circuit "ruled" on issues not presented to it, either by Petition for Permission to Appeal, Docketing Statement, or by briefs. The first panel "ruled" on issues not even raised in the appeal before it. The second panel then rubber stamped those same rulings (rightfully raised and properly justiciable only in the second appeal) by er-

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[6] *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36, 101 S. Ct. 188, 66 L. Ed.2d 193 (1980).

roneously applying the law of the case doctrine. The result is that Diamond Shamrock has been deprived of any meaningful appeal on those issues.

The issues which should have been decided in the interlocutory appeal were those relating only to Hamilton and Francis' counterclaims for breach of the implied covenants. The Petition for Permission to Appeal and Docketing Statement in the interlocutory appeal reflect that the only issues raised in the counterappeal pertained to the granting of a new trial after the first trial with respect to the implied covenant counterclaims. Further, the Fed. R. Civ. P. 54(b) certification on the final judgment expressly states that the issues raised in the certified interlocutory order were separate and independent from Diamond Shamrock's claim, Zinke & Trumbo's counterclaim for gross negligence, and Hamilton, Francis and richardson's counterclaim for negligence. The order granting a new trial after the first trial was reviewable in the interlocutory appeal only with respect to the two implied covenant claims.[7]

Zinke & Trumbo did not purport to be parties to the interlocutory appeal and did not brief whether the trial court erred in granting a new trial with respect to their counterclaim for gross negligence therein. Even though the interlocutory appeal involved only the two implied covenant claims, the Tenth Circuit's panel in the interlocutory appeal barely discussed those claims.

The Tenth Circuit in the instant appeal had before it the parties' briefs on the issues of the propriety

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[7] *United States v. Ft. Sill Apache Tribe of the State of Oklahoma*, 205 Ct. Cl. 805, 507 F.2d 861, 864 (1974).

of granting a new trial after the first trial on Diamond Shamrock's claim and on Respondents' counterclaims for gross negligence and negligence. The Tenth Circuit refused to consider those briefs. Instead, it based its decision on the law of the case doctrine, adopting the prior decision of a different panel in the interlocutory appeal. The prior panel decided issues not raised in the interlocutory appeal and not fully briefed by the parties. The Tenth Circuit in the instant appeal, by basing its decision solely on the law of the case doctrine, abdicated its responsibility to decide the issues properly raised only in the appeal before it and perpetuated the error committed by the panel in the appeal from the interlocutory order.

A writ should be granted because the Tenth Circuit drastically departed from the usual course of judicial review in reversing a judgment of the trial court and in reinstating a multi-million dollar verdict based on the law of the case doctrine.

## CONCLUSION

For these various reasons and for the reasons set forth in the Petition for Certiorari filed on October 14, 1986 in the case styled *Diamond Shamrock Corporation v. John Hamilton, et al.*, Case No. 86-607, this Petition for Certiorari should be granted. Petitioner reiterates its request that this case be consolidated with Case No. 86-607.

Respectfully submitted,

By: _____

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November 21, 1986

# APPENDIX

# APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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**Nos. 85-1653**
**&**
**85-1765**
**(D.C. No. 82-1754-E)**
**(W.D. Okla.)**

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DIAMOND SHAMROCK CORPORATION,
a Delaware corporation,
*Plaintiff-Appellee Cross-Appellant,*
v.

ZINKE & TRUMBO, LTD., a business association; ROBERT M. ZINKE, an individual; and DAVID B. TRUMBO, an individual,
*Defendants-Appellants Cross-Appellees,*
MORRIS A. RICHARDSON; JOHN HAMILTON; MARTHA N. FRANCIS,
*Counterclaimants-Appellants Cross-Appellees.*
[October 21, 1986]

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**ORDER AND JUDGMENT**

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Before BARRETT and BALDOCK, Circuit Judges, and CONWAY, District Judge.*

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*The Honorable John E. Conway, United States District Judge for the District of New Mexico, sitting by designation.

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After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal and cross-appeal. *See* Fed. R. App. P. 34(a); Tenth Cir. R. 10(e). The cause is therefore ordered submitted without oral argument.

These are an appeal and cross-appeal from a district court order entered after the second trial of the parties' claims. The facts are set out in detail in this court's earlier opinion, Diamond Shamrock Corp. v. Zinke & Trumbo, Ltd., 791 F.2d 1416 (10th Cir. 1986), but an overview is necessary for an understanding of the issues now before the court.

Plaintiff and defendants agreed to jointly develop the Hamilton Well on Section 33, a 640-acre tract of land in Oklahoma. They signed a contract under which defendants agreed to reimburse plaintiff for one-fourth of the development costs. Counterclaimants, who were the owners of the mineral estate underlying Section 33, were not parties to the contract.

When defendants refused to pay plaintiff the full amount which plaintiff thought was required by the contract, plaintiff sued defendants for breach of contract. Defendants denied liability and filed a counterclaim against plaintiff for gross negligence and breach of a new contract. Counterclaimants joined the suit, seeking damages from plaintiff for negligence. John Hamilton and Martha N. Francis, the two counterclaimants who owned the mineral interests underlying the land leased by plaintiff, also counterclaimed for breaches of implied covenants that plaintiff would market the gas and protect against drainage.

All of these claims were tried to a jury for the first time in 1983. The jury returned the following verdict: (1) for plaintiff against defendants on plaintiff's claim for breach of contract, (2) for defendants against plaintiff on

defendants' claim for gross negligence, (3) for plaintiff against defendants on defendants' claim for breach of a new agreement, (4) for counterclaimants against plaintiff on counterclaimants' claim for negligence, and (5) for Hamilton and Francis on their claim that plaintiff had breached an implied covenant to protect against drainage, but against them on their claim that plaintiff had breached an implied covenant to market.

After the trial, plaintiff moved for judgment notwithstanding the verdict or for a new trial. It argued that the jury's finding that defendants had breached the contract was irreconcilably inconsistent with the jury's findings that plaintiff had been negligent and grossly negligent. On January 11, 1984, the district judge entered an order denying plaintiff's motion for judgment notwithstanding the verdict and granting plaintiff's motion for new trial. We will refer to this order as the first new trial order.

The same claims were tried to a second jury in 1985. That jury found for plaintiff on its claim that defendants had breached the contract, but did not fill in any of the remaining blanks on the verdict form. On April 18, 1985, the district court entered a "Journal Entry of Judgment," which certified the following verdict as final pursuant to Fed. R. Civ. P. 54(b): for plaintiff on its claim that defendants had breached the contract, against defendants on all of their counterclaims, and against counterclaimants on their negligence claim. The appeal and cross-appeal now before this court, Nos. 85-1653 and 85-1765, are from this Rule 54(b) judgment.

On April 18, 1985, the district judge also issued a certified interlocutory order that (1) denied plaintiff's motion for judgment in accordance with its motion for directed verdict, (2) on the court's own motion, ordered a new trial with respect to John Hamilton's and Martha N. Francis' claims that plaintiff had breached two implied covenants, and (3) certified this interlocutory order *and* the first new

trial order for immediate appeal pursuant to 28 U.S.C. § 1292(b). The appeal and cross-appeal from this certified interlocutory order have already been decided by this court. *See* Diamond Shamrock Corp. v. Zinke & Trumbo, Ltd., 791 F.2d 1416 (10th Cir. 1986). There, this court held that the jury verdict at the first trial had been consistent, so a new trial should not have been granted. Accordingly, the judgment of the district court was reversed and the matter was remanded with instructions to reinstate the first jury verdict.

In the appeal and cross-appeal now before the court, plaintiff argues that (1) the correctness of the first new trial order is now properly before the court for the first time; (2) the first new trial order was correct; and (3) if it was not correct, any error was harmless because plaintiff's alternative motion for judgment notwithstanding the verdict after the first trial should have been granted. We disagree with each of these arguments, as explained below.

In the order appealed from in the prior appeal and cross-appeal, the district judge had explicitly certified the first new trial order for immediate appeal. Accordingly, the question of whether the district court had erred by entering the first new trial order was properly before this court in the prior appeal and cross-appeal. We reject plaintiff's first argument.

This court's prior opinion was proper and is binding on us as the law of the case. In that opinion, this court determined that the first jury verdict was consistent and that, as a result, a new trial should not have been granted. We reject plaintiff's second argument for this reason.

Therefore, the only remaining controversy in the appeal and cross-appeal now before us is whether plaintiff is correct that the first new trial order was harmless error. This argument is based on the premise that the district court should have granted plaintiff's motion for judgment not-

withstanding the verdict after the first trial. To obtain appellate relief on this ground, plaintiff would first have to show that, viewing the evidence in the light most favorable to defendant and counterclaimants, there was no evidence upon which the first jury's verdict could properly have been based. *See* Mackey v. Burke, 751 F.2d 322, 325 (10th Cir. 1984); 9 C. Wright & A. Miller, Federal Practice and Procedure §2524.

Having reviewed the record on appeal, we conclude that plaintiff failed to satisfy this test. The transcript of the first trial shows that the testimony of at least three witnesses, Mr. Barry, Professor Blick, and Mr. Kelly, supported the jury's finding that plaintiff had been negligent with respect to counterclaimants and grossly negligent with respect to defendants. The transcript also shows that Mr. Barry presented evidence upon which the jury could properly have based the damage awards.

We agree with defendants and counterclaimants that, since this court has ordered the verdict of the jury at the first trial to be reinstated, their claim that the district court erroneously excluded evidence from the second trial is moot. As a result, we express no opinion on the merits of that claim.

The judgment of the United States District Court for the Western District of Oklahoma is REVERSED and the case is REMANDED with instructions that the district court reinstate the general verdict of the jury at the first trial and enter judgment thereon.

The mandate shall issue forthwith.

/s/ ROBERT L. HOECKER
ROBERT L. HOECKER, Clerk

## APPENDIX B

## IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

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**No. CIV-82-1754-E**

---

DIAMOND SHAMROCK CORPORATION,
a Delaware corporation,

*Plaintiff,*

vs.

ZINKE & TRUMBO, LTD., a business association; ROBERT M. ZINKE, an individual; and, DAVID B. TRUMBO, an individual,

*Defendants,*

and

MORRIS A. RICHARDSON, JOHN HAMILTON, and MARTHA FRANCIS,

*Counterclaimants.*

[FILED April 18, 1985]

### JOURNAL ENTRY OF JUDGMENT

On February 11, 1985, the above cause and all counterclaims permitted by the Court to be heard by the jury came on for trial before the Court and jury, all parties being represented by their attorneys of record herein, and the parties having presented their evidence and authorities, and arguments to the Court and jury, and having closed all of the evidence on February 15, 1985, the jury, based upon the instructions given by the Court, returned its verdict on February 19, 1985 and made the findings as reflected on the Verdict Form, a true and correct copy of which is attached hereto as Exhibit "A". Based upon the jury's verdict and upon the law,

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff DIAMOND SHAMROCK CORPORATION recover on its Complaint from the Defendants the sum of $220,830.34. Based upon the jury's verdict and upon the law,

THE COURT FINDS AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant ZINKE & TRUMBO, LTD. recover nothing on its counterclaim against DIAMOND SHAMROCK CORPORATION for gross negligence and that the Counterclaimants JOHN HAMILTON, MARTHA FRANCIS and MORRIS RICHARDSON recover nothing on their claim for negligence against DIAMOND SHAMROCK CORPORATION.

THE COURT FINDS AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED as follows:

1. DIAMOND SHAMROCK CORPORATION is entitled to judgment, pursuant to this Court's previous rulings including its February 8, 1985 rulings, against ZINKE & TRUMBO, LTD. on ZINKE & TRUMBO, LTD.'s claim for breach of an oral agreement and on ZINKE & TRUMBO, LTD.'s claim for actual and punitive damages for kickbacks.

2. DIAMOND SHAMROCK CORPORATION is further awarded, pursuant to this Court's ruling on April 11, 1985, attorney fees in the amount of $140,000.00 against Defendants and Counterclaimants.

3. Costs will be determined by separate application pursuant to the agreement of the parties.

4. DIAMOND SHAMROCK CORPORATION is entitled to post-judgment interest on the amount awarded by the jury and the amount awarded as attorney fees at the rate of 9.17% per annum from the date hereof.

5. DIAMOND SHAMROCK CORPORATION is allowed all writs and processes provided by law for the enforcement of this judgment.

## CERTIFICATION

This Court has found that the jury did not return a verdict on Counterclaimants JOHN HAMILTON and MARTHA FRANCIS' claims for breaches of the implied covenants to market and to protect against drainage. The Court finds that, as to the claims which the Court has entered judgment by its Journal Entry of Judgment, finality should be ordered to advance the interests of sound judicial administration and justice to the litigants, based upon a balancing of competing factors, including the following:

1. The claims upon which the Court has entered judgment by its Journal Entry of Judgment were finally adjudicated and they are separate, distinct and independent from Counterclaimants HAMILTON and FRANCIS' claims for breaches of the implied covenant to market and to protect against drainage.

2. Certification of these claims will not result in unnecessary appellate review nor will the questions raised in such appeal have to be decided more than once in the event of a subsequent appeal because the above claims are separate and unrelated to Counterclaimants HAMILTON and FRANCIS' claims for breaches of the implied covenant to market and to protect against drainage.

3. An immediate review of the claims finally adjudicated would not be mooted by any future developments in this lawsuit.

4. Due to the length of time that this lawsuit has been pending and because two lengthy jury trials have already been held in this case, any further delay in the entry of judgment would be unjust to the parties. Judgment should also be entered so that it will bear interest.

IT IS THEREFORE CERTIFIED that, with respect to the claims finally determined by the jury's verdict and the Journal Entry of Judgment to which this certificate is

appended, in accordance with Rule 54(b), Fed. R. Civ. P., (1) the Court has directed the entry of final judgment for the Plaintiff on its Complaint in the amount of $220,830.34, and against Defendants on their counterclaims for gross negligence, breach of oral contract and kickbacks, including punitive damages, and against all Counterclaimants on their counterclaim for negligence; and (2) the Court has determined there is no just reason for delay.

Dated this 18 day of April, 1985.

/s/ LUTHER B. EUBANKS
The Honorable Luther B. Eubanks,
Chief Judge United States District
Court, Western District of Oklahoma

Entered In Judgment
Docket 4-18-85

Approved as to form:

/s/ JAMES U. WHITE, JR.
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Attorneys for Defendant and
Counterclaimants

/s/ H.B. WATSON, JR.

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Attorneys for Plaintiff

SLT/24/sp

**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA**

---

**CIV-82-1754-E**

---

DIAMOND SHAMROCK CORPORATION,
a Delaware corporation,

*Plaintiff,*

v.

ZINKE & TRUMBO, LTD., a business association; ROBERT M. ZINKE, an individual; and DAVID B. TRUMBO, an individual,

*Defendant.*

## V E R D I C T

[Place either "plaintiff," "defendants," or "counterclaimants" in the first blank.]

We, the Jury, being duly empaneled and sworn upon our oath, find as follows:

1. for the plaintiff upon the claim by the plaintiff, Diamond Shamrock Corporation, for breach of the operating agreement and fix damages in the amount of $220,830.34;

2. for the _____ upon the claim by the defendant, Zinke & Trumbo, Ltd., for gross negligence and/or willful misconduct in the operation of the well and fix actual damages in the amount of $ _____ ; and punitive damages, if any, in the amount of $ _____ .

3. for the _____ upon the claim by the counterclaimants, Morris A. Richardson, John Hamilton, and Martha Francis, for negligence in the operation of the well and fix damages in the amount of $ _____ ; and punitive damages, if any, in the amount of $ _____ ;

4. for the _____upon the claim by the counter-claimants, John Hamilton and Martha Francis for breach of the implied covenant to protect against drainage, and fix actual damages in the amount of $ _____ ; and punitive damages, if any, in the amount of $ _____ .

5. for the _____upon the claim by the counter-claimants, John Hamilton and Martha Francis, for breach of the implied covenant to market and fix actual damages in the amount of $ _____ ; and punitive damages, if any, in the amount of $ _____ .

2-29-85 — Date

LOUIS MCCLURE — Foreman

**EXHIBIT A-PAGE 2 OF 2 PAGES**

## APPENDIX C

## IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

---

**No. CIV-82-1754-E**

---

DIAMOND SHAMROCK CORPORATION,
a Delaware corporation,

*Plaintiff,*

vs.

ZINKE & TRUMBO, LTD., a business association; ROBERT M. ZINKE, an individual; and, DAVID B. TRUMBO, an individual,

*Defendants,*

and

MORRIS A. RICHARDSON, JOHN HAMILTON, and MARTHA FRANCIS,

*Counterclaimants.*

[FILED April 18, 1985]

## CERTIFIED INTERLOCUTORY ORDER

On this 28th day of March, 1985, Plaintiff's Motion for Judgment in Accordance with Motion for Directed Verdict came on for hearing before the Court, all parties being represented by their attorneys of record herein, and the parties having presented their authorities and arguments and based upon the record in this case, the Court hereby finds as follows:

1. That Plaintiff's Motion for Judgment in Accordance with Motion for Directed Verdict should be denied.

2. That on February 11, 1985, the above cause and all counterclaims permitted by the Court to be heard by the jury came on for trial before the Court and jury and that, on February 19, 1985, the jury returned its verdict. By its Journal Entry of Judgment, the Court has rendered judgment in favor of Plaintiff and against Defendants in the amount of $220,830.34 and further against Defendants on their counterclaims of gross negligence, breach of oral contract and kickbacks including punitive damages, and against Counterclaimants on their claim of negligence.

3. The Court's oral instructions to the jury, explaining the verdict forms, may be erroneous and the jury failed to return a verdict either for or against Counterclaimants JOHN HAMILTON and MARTHA FRANCIS on their counterclaims for breaches of the implied covenants to protect against drainage and to market.

4. The Court finds, on its own Motion and pursuant to its letter to counsel for all parties in this case dated February 20, 1985, which is on file in this case, that a new trial should be granted on Counterclaimants JOHN HAMILTON and MARTHA FRANCIS' counterclaims for breach of the implied covenant to market and to protect against drainage.

5. Two jury trials have been held in this case, the Court having previously granted Plaintiff's Motion for New Trial filed after the first jury trial by its Order entered on January 11, 1984.

6. The denial of Plaintiffs' Motion for Judgment in Accordance with Motion for Directed Verdict, the granting of a new trial upon the Court's own Motion and the granting of Plaintiff's Motion for New Trial on January 11, 1984 involve controlling questions of law as to which there are substantial grounds for differences of opinion.

7. An immediate appeal from the rulings specified in Paragraph 6 above may materially advance the ultimate determination of the litigation.

8. An immediate appeal from the rulings herein will prevent protracted and expensive litigation. This matter has been pending for two and one-half years and two lengthy jury trials have been held on these claims, the Court having previously granted a motion for new trial after the first jury trial was held.

9. An immediate appeal will expedite the ultimate termination of this litigation and thereby save unnecessary expense and delay.

10. This Court has directed the entry of final judgment with respect to all other claims in this action, with the exception of JOHN HAMILTON and MARTHA FRANCIS' counterclaims for breach of the implied covenant to market and to protect against drainage. This Court has certified such judgment for immediate appeal pursuant to Rule 54, Fed. R. Civ. P. Thus piecemeal appeals will be avoided by certification of the controlling questions of law involved in these interlocutory orders because all issues can be appealed at the same time.

11. An immediate appeal may avoid a third jury trial on the claims for failure to market and protect against drainage because the incorrect disposition of the controlling questions of law raised by the rulings herein would require reversal of the orders granting a new trial and/or the order denying Plaintiff's Motion for Judgment in Accordance with Motion for Directed Verdict and the reversal of any judgment rendered on a jury verdict after third new trial.

12. An immediate appeal would more efficiently dispose of this litigation under the circumstances of this case.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff DIAMOND SHAMROCK CORPORATION's Motion for Judgment in Accordance with Motion for Directed Verdict is denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a new trial is hereby granted on Counterclaimants JOHN HAMILTON and MARTHA FRANCIS' counterclaims for breaches of the implied covenants to market and to protect against drainage.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the new trial hereby granted is stayed until the Court of Appeals disposes of the interlocutory appeal brought from these rulings or until the time for interlocutory appeal has passed without the parties having filed such an appeal.

## CERTIFICATION

I hereby certify that the issues disposed of by this Order denying Plaintiff's Motion for Judgment in Accordance with Motion for Directed Verdict and granting a new trial upon the claims of Counterclaimants JOHN HAMILTON and MARTHA FRANCIS for breaches of the implied covenants to protect against drainage and to market, and by the Order entered on Jaunary 11, 1984 granting Plaintiff's Motion for New trial, involve controlling questions of law as to which there are substantial grounds for differences of opinion and that an immediate appeal from these Orders may materially advance the ultimate termination of this litigation.

Dated this 18 day of April, 1985.

/s/ LUTHER B. EUBANKS
The Honorable Luther B. Eubanks,
Chief Judge United States District
Court, Western District of Oklahoma

Entered In Judgment
Docket 4-18-85

Approved as to form:

/s/ JAMES U. WHITE JR.
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*Attorneys for Plaintiff*

SLT/25/sp

## APPENDIX D

## IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

**No. CIV-82-1754-E**

DIAMOND SHAMROCK CORPORATION,
a Delaware corporation,

*Plaintiff,*

v.

ZINKE & TRUMBO, LTD, a business association; ROBERT M. ZINKE, an individual; and, DAVID B. TRUMBO, an individual.

*Defendants.*

[FILED January 11, 1984]

## ORDER GRANTING NEW TRIAL AND VACATING JUDGMENT

NOW on this 5th day of January, 1984, came on for hearing the Motion for Judgment Notwithstanding the Verdict or, in the Alternative, New Trial filed herein by DIAMOND SHAMROCK CORPORATION, with the Plaintiff DIAMOND SHAMROCK CORPORATION appearing by and through its attorneys H. B. Watson, Jr. and Richard K. Books, and the Defendants ROBERT M. ZINKE and DAVID B. TRUMBO appearing personnally and through their counsel Gary Davis and James U. White, and the Defendant ZINKE & TRUMBO, LTD. and the Counterclaimants Hamilton, Richardson and Francis appearing by and through the same counsel.

The Court, after hearing the authorities presented in the argument of counsel, finds that the Motion for Judgment Notwithstanding the Verdict should be denied and that the Motion for New Trial should be granted in all respects.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the verdict entered in this case on November 2, 1983, should be and is hereby vacated, set aside and held for naught.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the judgment entered herein on November 10, 1983, should be and is hereby vacated, set aside and held for naught.

Dated this 11 day of January, 1984.

BY: /s/ LUTHER E. EUBANKS
Honoraole Luther E. Eubanks

ENTERED IN JUDGMENT DOCKET ON 1-11-84
APPROVED AS TO FORM:

BY: /s/ H.B. WATSON, JR.
H.B. Watson, Jr.
Richard K. Books
Watson & McKenzie
1900 Liberty Tower
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BY: _____
Mr. Gary Davis
Mr. James U. White, Jr.
Crowe & Dunlevy
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## APPENDIX E

## IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

---

**No. CIV-82-1754-E**

---

DIAMOND SHAMROCK CORPORATION,
a Delaware corporation,

*Plaintiff,*

v.

ZINKE & TRUMBO, LTD., a business association; ROBERT M. ZINKE, an individual; and DAVID B. TRUMBO, an individual,

*Defendants.*

[FILED November 16, 1983]

## JOURNAL ENTRY OF JUDGMENT

On October 27, 1983, the above cause and all counterclaims therein, came on for trial before the Court and Jury, all parties being represented by their attorneys of record herein, and the parties having presented their evidence and authorities, and arguments to the Court and Jury, and having closed all of the evidence on October 31, 1983, the Jury made its Verdict based upon the instructions given by the Court, finding for the plaintiff on its complaint, and for the counterclaimants on their counterclaims in the respective amounts indicated in the Jury's Verdict dated November 2, 1983. Based upon the Jury's Verdict and upon the law,

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff, Diamond Chemicals Company, recover on its complaint from the defendants the sum of $212,805.60.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that counterclaimant Zinke & Trumbo, Ltd., recover on its counterclaim the sum of $995,196.00 from Diamond Chemicals Company and that counterclaimants John Hamilton, Martha Frances and Morris Richardson jointly recover on their counterclaims the sum of $971,179.00 from Diamond Chemicals Company and that counterclaimants John Hamilton and Martha Frances jointly recover on their counterclaims the sum of $1,032,499.00 from Diamond Chemicals Company:

Based upon the Jury's Verdict and upon the law,

IT IS FURTHER ORDERED, ADJUDGED AND DECREED as follows:

(1) That defendants breached the parties' written joint operating agreement by their failure to pay their proportionate share of completion costs, for which Diamond Chemicals Company is entitled to recover on its complaint the damages awarded by the jury as above-indicated.

(2) That Diamond Chemicals Company performed operations on the Hamilton Well in a grossly negligent manner, for which counterclaimant Zinke & Trumbo, Ltd., is entitled to recover on its counterclaim the damages awarded by the jury as above-indicated.

(3) That Diamond Chemicals Company performed operations on the Hamilton Well in a negligent manner, for which counterclaimants John Hamilton, Martha Frances and Morris Richardson, are entitled to jointly recover on their counterclaims the damages awarded by the jury as above-indicated.

(4) That Diamond Chemicals Company breached its duty to counterclaimants John Hamilton and Martha Frances to protect against drainage as implied under the parties' respective leases, for which counterclaimants John Hamilton and Martha Frances are jointly entitled to actual damages as awarded by the jury in the amount of $32,499.00. Because of the nature of plaintiff's breach of this implied

duty to protect against drainage, counterclaimants John Hamilton and Martha Frances are further entitled to jointly recover punitive damages as awarded by the jury in the amount of $1,000,000.00.

(5) All parties are entitled to post-judgment interest on their respective recoveries as awarded by the jury at the rate of nine and eighty-six one hundredths percent (9.86%) per annum from the date hereof.

(6) The awarding of attorney's fees and costs shall be determined by separate application of the parties.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all parties are allowed all writs and processes provided by law for the enforcement of this judgment.

DATED this 16 day of November, 1983.

/s/ LUTHER B. EUBANKS
LUTHER B. EUBANKS
Chief Judge - U.S. District Court
Western District of Oklahoma

ENTERED IN JUDGMENT DOCKET ON 11-16-83

Approved as to form:

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Approved as to form:

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